IN THE
MISSOURI SUPREME COURT

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| STATE OF MISSOURI., | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | No. SC84151 |
| | ) | |
| GERMAINE FRENCH, | ) | |
| | ) | |
| Appellant. | ) | |

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APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION FIVE
THE HONORABLE KEITH MARQUART, JUDGE

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# APPELLANT'S SUBSTITUTE REPLY BRIEF

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## JURISDICTIONAL STATEMENT

Appellant adopts and incorporates the Jurisdictional Statement from his opening brief.

## STATEMENT OF FACTS

Appellant adopts and incorporates the Statement of Facts from his opening brief.

## POINT RELIED ON[1]

**I.**

**The trial court erred in sentencing Appellant for two separate counts of felony non-support because this violated Appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Section 556.041, in that the State attempted to prosecute separately, in two counts, behavior that constituted a continuing course of conduct, since the charges were based upon Appellant's failure to provide support for Marekus over the course of time.**

*State v. Barber*, 37 S.W.3d 400 (Mo. App., E.D. 2001);

*Horsey v. State*, 747 S.W.2d 748 (Mo. App., S.D. 1988);

*State v. Morrow*, 888 S.W.2d 387 (Mo. App., S.D. 1994);

*State v. Morovitz*, 867 S.W.2d 506 (Mo. banc 1993);

U.S. Const., Amendments 5 & 14;

Sections 226.710, 436.005, 436.061, 436.071, 454.435, 556.041, 568.040, 573.060, 577.155, 578.100 & 650.270 (2000);

Iowa Code § 726.5 (2000);

Ohio Revised Code § 2919.21 (2000);

Texas Penal Code Ann. § 25.05 (2000); and

Wis. Stat. §§ 49.90 & 948.22 (2000).

[1] Appellant replies to Point I of Respondent's brief, and he relies on his opening brief as to Points II and III.

## ARGUMENT[2]

### I.

**The trial court erred in sentencing Appellant for two separate counts of felony non-support because this violated Appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Section 556.041, in that the State attempted to prosecute separately, in two counts, behavior that constituted a continuing course of conduct, since the charges were based upon Appellant's failure to provide support for Marekus over the course of time.**

Appellant replies to several factual and legal errors in Respondent's substitute brief.

***Appellant raised this exact argument in the Court of Appeals***

Respondent accuses Appellant of changing his theory on appeal in this Court (Resp.Br. 35). However, as the record clearly shows, Appellant's argument is the same as that which was raised in the Western District. Perhaps Respondent did not read Appellant's Western District reply brief or recall the oral argument held in that Court. If he had, he would remember that Appellant's arguments were raised in and considered by the Court below.

[2] Appellant replies to Point I of Respondent's brief, and he relies on his opening brief as to Points II and III.

It was in his Western District brief that Respondent first began his doomsday refrain that the State, under Appellant's argument, would be limited to only one felony charge over the course of the child's minority, thereby allowing a nonsupporting parent to "violate the law with impunity" (WD Resp. Br. 8-9, 12-13). In direct response to Respondent's argument, Appellant's Western District reply brief assured the Court that his argument did no such thing. On the contrary, Appellant argued that his position actually encouraged the State to timely charge the nonsupporting parent, thus breaking the course of conduct (WD App. Br. 7-8). If the parent, once punished, embarked upon another course of nonpayment, then the State could pursue an additional charge (WD App. Br. 7-8); ***See Boss v. State,* 702 N.E.2d 782 (Ind. App. 1998)**. However, to allow the nonsupport to continue indefinitely, and then bring multiple felony counts to bear against an individual for one continuous course of conduct, simply does not further the legislative intent to "compel recalcitrant persons to fulfill their obligations of care and support." ***See Comment to 1973 Proposed § 568.040***

Respondent finds it "absurd" and "utter nonsense" that a prosecuting attorney should promptly enforce the nonsupport law (Resp. Br. 36-37). However, Respondent fails to explain how a prosecutor's inaction promotes the Legislature's purpose "to compel recalcitrant persons to fulfill their obligations of care and support." What would happen if the Division of Child Support Enforcement or a custodial parent approached the prosecuting attorney with a case of delinquent support lasting six months, and the prosecutor, instead of pursuing a

charge, chose to wait six more months and then charge the delinquent parent with two felonies for the year-long course of conduct? Would the Department of Social Services be better off? Would the child be better off? Would the delinquent parent be in a better or worse position to meet his obligation of support? Contrary to Respondent's belief that a prosecutor may delay prosecution and belatedly charge the parent with multiple felonies, **Section 454.435.2** suggests that the prosecutor has a duty to act *promptly*:

> 2. In all cases where a prosecuting attorney has entered into a cooperative agreement to litigate or prosecute an action necessary to secure child support, and an information is not filed or civil action commenced within sixty days of the receipt of the referral from the division, the division may demand return of the referral and the case filed and the prosecuting attorney shall return the referral and the case file.

The Division of Child Support Enforcement is aware of the Legislature's intent. It is charged with the duty of promptly obtaining child support in order to reimburse the State for funds paid out in assistance. Respondent's argument, on the other hand, allows a parent to accumulate substantial delinquencies in payment, making the chances of paying future support, much less arrearages, while serving a lengthy sentence nonexistent. Meanwhile, the State waits to charge multiple felonies, even though it had the opportunity to bring an immediate charge at six months and thereby "compel" the recalcitrant parent to pay.

Respondent also asserts that the statute of limitations and the likelihood of concurrent sentences for repeat violations "would decrease any incentive the State might otherwise have to delay prosecution in order to allow a defendant to commit multiple offenses." (Resp. Br. 37). However, under the Respondent's argument, the current statute of limitations would allow the State to charge a defendant with six felonies carrying a possible range of punishment of thirty years imprisonment. But the legislature realized that "[i]mposition of punishment, particularly a fine or imprisonment, can only frustrate the object of the support statutes by guaranteeing that the defendant will be unable to meet his obligation." ***Comment to 1973 Proposed § 568.040.*** While it decided that imposition of punishment may, nonetheless, be necessary, there is a difference between punishment imposed to "compel" payment versus punishment imposed for the sole purpose of punishing the nonpaying parent. Furthermore, while Respondent argues that concurrent sentences are the norm in nonsupport cases, the Court's imposition of consecutive sentences in the present case belies that argument.

***The Legislature knows how to say what it means***

The main question for this Court is whether it can divine a legislative intent from the language of **Section 568.040**. The legislature may expressly declare the limits of a unit of prosecution, but when it has not done so, and in the absence of a contrary intent, a construction of leniency is favored. ***Horsey v. State*, 747 S.W.2d 748, 751 (Mo. App., S.D. 1988)**. This Court should also be mindful that when the legislature has the will, it has no difficulty in expressing it -- that is, the

legislature is very adept at defining what it desires to make the unit of prosecution. ***See Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed.905 (1955)**. The Revised Statutes of Missouri are replete with examples of the legislature's ability to define the unit of prosecution.

For example, **Section 573.060.1** prohibits the public display of explicit sexual material. Subsection 3 prescribes the unit of prosecution for that offense: "for purposes of this section, each day there is a violation of this section shall constitute a separate offense." **Section 573.060.3**.

**Section 577.155.1** prohibits the construction or use of any waste disposal wells in the State. Subsection 5 prescribes the unit of prosecution: "Each day of violation constitutes a separate offense." **Section 577.155.5**.

**Sections 436.005** to **Section 436.071** regulate pre-need contracts for the funeral industry. **Section 436.061.1** provides that a knowing and willful violation of those Sections constitutes a class D felony, and that "each violation of any provision constitutes a separate offense and may be prosecuted individually."

"Each day a junkyard is unlawfully maintained constitutes a separate [misdemeanor] offense." **Section 226.710**.

"Each day of unlawful operation [of a boiler or pressure vessel without an inspection certificate] is a separate [misdemeanor] offense." **Section 650.270**.

"Each separate sale or offer to sell [in violation of the Sunday laws] shall constitute a separate offense." **Section 578.100.2.1**.

And there are dozens more.

Our legislature knows how to specify the unit of prosecution when it wishes to do so. But when the legislature leaves to the judiciary the task of imputing to the legislature an undeclared will, the ambiguity should be resolved in favor of lenity. ***Bell, supra***. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. ***Id.*** If the legislature desires the result asserted by the Respondent, it needs to say so. Certainly other jurisdictions are capable of delineating the unit of prosecution. As mentioned in Appellant's opening brief, Wisconsin's statute states that, "any person who intentionally fails for 120 or more consecutive days to provide…child support…is guilty of a Class E felony. A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods." **Wis. Stat. Section 948.22(2) (2000)**. If this is the result the legislature intends in Missouri, it needs to say so. As it stands now, while unambiguous as a sentence enhancement section, **Section 568.040.4** *is* ambiguous to delineate the allowable unit of prosecution.

Furthermore, Appellant is perplexed by Respondent's argument that resort to 556.041 is inappropriate under any circumstance where the State is seeking to impose multiple punishments for conduct that violates the same statute (Resp. Br. 20). Even the cases cited by Respondent acknowledge that when the statute is silent, then we look to the general cumulative punishment statute, **Section 556.041**. ***State v. Barber,* 37 S.W.3d 400, 403 (Mo. App., E.D. 2001)**.

The defendant in ***Barber*** was sentenced for three counts of unlawful use of a weapon under Subsection (4) of 571.030. ***Id.* at 400**. Since the Court found that the legislature clearly intended to allow cumulative punishments, the Court did not need to resort to **Section 556.041**. However, in making this determination, the Court held that "it would be improbable for the legislature to intend cumulative punishments for one type of unlawful use of weapons, but not for another. ***Id.* at 404**. This insight is particularly relevant for the analysis in this case because the subsection at issue -- **Section 568.040.4**-- contains two separate ways to enhance nonsupport from a misdemeanor to a felony. Appellant argues that Subsection 4 is a sentence enhancement provision, while Respondent argues that this subsection defines the unit of prosecution and authorizes cumulative punishments. But, if Respondent is correct, then the legislature must have intended cumulative punishments for monetary amounts as well as time periods. Conveniently, Respondent makes no mention of the language in the statute that alternatively elevates the crime to a felony if "the total arrearage is in excess of five thousand dollars." **Section 568.040.4**. This clause cannot be reconciled with Respondent's theory. How exactly would the legislature cumulatively punish a violation of this section? Could a defendant be punished at $5,001, $6,000, $7,000 or every $5,000, or every day that the arrearage amount exceeds $5,000?

The impossibility of fitting this language into Respondent's theory simply proves that the legislature did not intend to delineate the allowable unit of prosecution in Subsection (4). Rather, that subsection is merely a sentence

enhancement section. A parent's conduct should be examined over the course of a year. If at the end of a year, the parent has failed to support during at least six months -- remember, they do not need to be consecutive months -- *or* if the parent accumulates total arrearages in excess of 5,000, then that parent is guilty of a felony rather than a misdemeanor.

***"Support," under the statute, is not calculated on a monthly basis***

Another fallacy in Respondent's argument is that "a parent's obligation to support his child is calculated on a monthly basis." (Resp. Br. 19). This is incorrect. Under our current nonsupport statute, "support" is not linked to court-ordered child support payments. In fact, this Court has said that, "prosecution under the criminal nonsupport statute should not be viewed as a means of enforcing the terms of a decree." ***State v. Morovitz*, 867 S.W.2d 506, 508 (Mo. banc 1993)**. Indeed, evidence regarding defendant's failure to make decretal support payments, while not all together irrelevant, are not conclusive of the issue of the existence of a legal obligation to support. ***Id.***

The legislature did not see fit to change this with its 1993 Amendment to **§ 568.040**. Certainly, it could have done so. Many states have included "court-ordered child support" in their definition of "support." For example, in Wisconsin, "support" for a child means "an amount which a person is ordered to provide for support of a child by a court of competent jurisdiction in this state or in another

state, territory or possession of the United States, or, if not ordered, an amount that a person is legally obligated to provide under **§ 49.90**."[3] **Wisconsin Statute § 948.22**. Iowa's nonsupport statute, **Iowa Code § 726.5**, defines support as "any support which has been fixed by court order, or, in the absence of any such order or decree, the minimal requirements of food, clothing or shelter." **Section 2919.21** of the Ohio Revised Code states that "No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support."

Contrary to the language in the above statutes, Missouri statute **568.040.2(3)**, defines "support" only as "food, clothing, lodging, and medical or surgical attention." There is no mention of "court-ordered" child support anywhere in the statute. Therefore, contrary to Respondent's assertion that our statute "clearly and unequivocally provides that a person violates the statute on a monthly basis where he or she fails to pay adequate child support during that month" (Resp.Br. 11), it clearly says nothing of the sort. If Respondent desires "support" to be linked to monthly court-ordered support, that is an issue he should take up with the legislature.

[3] **Section 49.90** requires the parent of a dependent person under the age of 18 to maintain his or her child so far as the parent is able, and to the extent that the dependent person is unable to do so, regardless of whether a court has ordered maintenance.

***Other Jurisdictions***

Briefly, Appellant notes that he fully discussed ***State v. Grayson*, 172 Wis.2d 156, 493 N.W.2d 23 (1992)**, and ***Boss v. State*, 702 N.E.2d 782 (Ind. App. 1998)** in his opening brief and will not rehash those arguments here. Suffice it to say that ***Grayson*** is inapposite because ***Grayson*** interpreted a Wisconsin statute that is completely dissimilar to Missouri's nonsupport statute. Wisconsin's statute specifically delineates the allowable unit of prosecution -- ours does not.

***Boss*** supports Appellant's position because it silences Respondent's argument that Appellant could only be charged once over the course of a child's minority -- Boss held that, "where a parent fails to provide support following an earlier conviction, the parent commits another offense." **702 N.E.2d at 785**.

However, the ***Boss*** Court granted relief on the defendant's second double jeopardy claim, which is the same ground Appellant raises here. The defendant's nonsupport is one ongoing and continuous act which can be terminated only by providing support and, therefore, the consecutive sentences which resulted from three separate charges and convictions constitute multiple punishments for the same offense. ***Id.* at 785**. Because the nonsupport was continuous, the defendant could be convicted and sentenced for only one crime. ***Id***. The Court specifically noted that the length of nonsupport and the amount of the arrearage go to the severity of the crime and the length of the sentence to be imposed - not to how many crimes may have been committed. ***Id***. That is precisely Appellant's argument in the present case.

As for Respondent's brief description of his three additional cases, none of them aid his argument. In ***State v. Johnson*, 948 S.W.2d 39 (Tex. App. 1997)**, the defendant alleged double jeopardy because he had previously been held in contempt of court for failing to pay court-ordered child support. This argument is very similar to ***Boss***' first argument, which the Indiana Court also rejected. The ***Johnson*** court found that the time periods at issue were different, and therefore Johnson's previous punishments for contempt did not bar the current prosecution. Unlike ***Johnson*** and ***Boss***, Appellant is not raising a "successive prosecutions" argument. It should also be noted that the Texas nonsupport statute at issue in ***Johnson*** specifically defines support as "court-ordered" child support, whereas ours does not. ***See* Texas Penal Code Ann. § 25.05**.

***State v. James*, 203 Md. 113, 100 A.2d 12 (Md. App. 1953)**, and ***Ohio v. Schaub*, 16 Ohio App.3d 317, 475 N.E.2d 1313 (1984)**, are also "successive prosecution" cases and, as such, are inapplicable to the analysis of this case. Both defendants were asserting a double jeopardy bar to additional prosecutions because they had previously been convicted or acquitted of criminal nonsupport. Respondent obviously finds these cases appealing because they support his misguided attack on Appellant's argument. Despite Respondent's wish to the contrary, Appellant is not arguing that the State is precluded from ever charging a defendant after a first prosecution. If a parent, once punished, renews another course of nonpayment, he may be prosecuted again. The State, however, may not bring multiple counts in the same prosecution for a continuous course of conduct.

## *Summary of Argument*

In double jeopardy cases regarding multiple punishments, the key question is whether cumulative punishments were intended by the legislature. ***Missouri v. Hunter,* 459 U.S. 359, 366-69, 103 S.Ct. 673, 678-80, 74 L.Ed.2d 535 (1983)**. To determine legislative intent, this Court must examine the *definition* of the offense and its allowable unit of prosecution. ***State v. Morrow*, 888 S.W.2d 387, 390 (Mo. App., S.D. 1994)**. When the statute is ambiguous, as fully discussed herein, this Court must look to the general cumulative punishment statute, **Section 556.041**. ***Barber,* 37 S.W.3d at 403**. The applicable subsection **556.041(4)** provides that a defendant may not be convicted of more than one offense if the offense is defined as *a continuing course of conduct* and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses. Nonsupport has always been an example of a continuing course of conduct, and **Section 568.040** does not provide that specific periods of such conduct constitutes separate offenses. While subsection (4) elevates nonsupport to a felony under certain circumstances, it does not specify the allowable unit of prosecution. For one continuous course of conduct, the State may not bring two felony charges.

If the evidence is sufficient to convict, it supports only one count of nonsupport. Holding otherwise violates Appellant's right to be free from double jeopardy and violates **Section 556.041**. Therefore, the conviction in case CR399-330F must be reversed and Appellant discharged from that sentence.

## CONCLUSION

Because Appellant was subjected to double jeopardy by being doubly tried and sentenced for an action which constituted a continuing course of conduct (Point I), he respectfully requests that this Court reverse his conviction on one count of felony nonsupport and discharge him from that sentence. Alternatively, because the evidence was insufficient to sustain either conviction (Point II), Appellant respectfully requests that this Court reverse both of his convictions and discharge him from both sentences. Finally, because the trial court allowed the admission of irrelevant evidence surrounding Appellant's refusal to submit to genetic testing (Point III), he respectfully requests that this Court reverse his convictions and grant him a new trial.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Amy M. Bartholow, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word 2000, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,663 words, which does not exceed the 7,750 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.0, updated in March, 2002. According to that program, these disks are virus-free.

On the 21st of March, 2002, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Philip M. Koppe, Assistant Attorney General, Penntower Office Center, 3100 Broadway, Suite 609, Kansas City, MO 64111.

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